(4)

No. 08-1232

IN THE

Supreme Court of the United States

CARLYLE FORTRAN TRUST,

Petitioner,

v.

NVIDIA CORPORATION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Carlyle Fortran Trust ("Carlyle") purports to present the following questions, though some are not legitimately presented by this case:

1. In *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416, 428 (1972), this Court held that a bankruptcy trustee does not have standing to assert claims "on behalf of debenture holders," a class of the creditors. Positing a split in the circuits on this point, Carlyle asks whether a trustee also lacks standing to press a claim that belongs to all creditors.

2. The Second Circuit's so-called "*Wagoner* rule," holds that, under New York law, a bankruptcy trustee lacks standing to pursue a claim against a defendant for defrauding the debtor corporation with the cooperation of the debtor's management. Was the Court of Appeals correct in declining to apply this standing rule?

3. The Bankruptcy Code caps claims by a debtor's landlord. Did the Ninth Circuit correctly hold that the mere existence of the statutory cap does not confer standing on a landlord to sue a party other than the debtor for the unpaid rent to the extent that the unpaid rent exceeds the statutory cap?

4. Carlyle claims that NVIDIA assumed a lease on which Carlyle was the landlord. In support of the claim, it attached to its complaint an unsigned facsimile of a redlined draft contract. It also presented an email that supposedly contradicts an integrated contract. Was the Court of Appeals

correct in applying California's statute of frauds to conclude that NVIDIA did not assume the lease?

CORPORATE DISCLOSURE STATEMENT

Respondent NVIDIA Corporation is a public company. No publicly held company owns 10% or more of its stock. Respondent NVIDIA US Investment Company is a wholly owned subsidiary of NVIDIA Corporation.

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INTRODUCTION

This bankruptcy appeal arises from an order dismissing Petitioner Carlyle Fortran Trust's complaint for lack of standing. Carlyle was the bankrupt debtor's landlord. In this suit, it does not seek to recover rent from the debtor. Rather, it blames third parties for the debtor's financial failure, and has sued them for the rent. Specifically, it alleges the defendants paid too little for the debtor's assets in a pre-bankruptcy asset purchase transaction, leaving the debtor unable to meet its financial obligations.

At bottom, this case is about who has standing to bring such a claim: May creditors sue third parties on such claims, or do the claims belong exclusively to the bankruptcy trustee? Under bankruptcy law, it must be one or the other; otherwise a creditor could beat the estate to a defendant and seek recoveries at the expense of the estate (and all the other creditors). The courts of appeals uniformly articulate the dividing line the Ninth Circuit applied in this case, that a bankruptcy trustee has exclusive standing to bring claims based on an underlying injury to the debtor, even though an injury to the debtor may also have ripple effects that derivatively harm creditors. App. 5-6.[1]

Carlyle does not dispute that universal rule. It does not purport to present any question about who can bring claims *based on injuries to the debtor.*

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[1] Petitioner's Appendix is cited herein as "App. __" The NVIDIA Respondents' Appendix is cited as "Resp. App. __"

Instead, it characterizes the central issue as revolving around who can bring claims *based on injuries inflicted directly on the creditors.* Acknowledging that the Supreme Court has held that a trustee may never bring claims on behalf of a *subset of creditors*, *see Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416 (1972), Carlyle asks this Court to decide whether a trustee may nevertheless bring a "general" claim for harm inflicted on *all creditors*, regardless of the cause of that injury. But this case does not present the question—and the Court of Appeals did not decide it—because the Court of Appeals held that the claims in question *did not belong to the creditors*, but only to the debtor.

In its second question, Carlyle asks this Court to decide whether to adopt a standing rule articulated by the Second Circuit in *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 118 (2d Cir. 1991). In essence, the "*Wagoner* rule" is that under New York law, a bankruptcy trustee lacks standing to sue a defendant for harm inflicted on the debtor, if a potential defense to that claim is *in pari delicto*,—that the defendant was in cahoots with the debtor's management to cause the harm—so the debtor cannot seek to recover for its own wrongdoing. This question in substance is just a variant of the first question, and no more cert.-worthy. Moreover, because the *Wagoner* rule is a product of New York state law, and this case involves California law, uniformity is unimportant, and there is no reason for this Court to intervene. Finally, the *Wagoner* rule does not apply—and never has been applied—in the manner Carlyle advocates.

Carlyle also seeks review of an esoteric issue concerning the relationship between these standing doctrines and the cap that the Bankruptcy Code imposes on landlord claims in bankruptcy. Carlyle enthuses that this is "a question of first impression," Pet. 30, on which it could "not find any case law," whatsoever, Pet. 27, as if this were a selling point for Supreme Court review. Finally, Carlyle asks this Court to review a fact-bound application of California's statute of frauds. Neither assignment is consistent with this Court's customary role.

Carlyle's petition should be denied.

STATEMENT OF THE CASE

3dfx Interactive, Inc. ("3dfx"), was a technology company whose business began to falter in 1999. Throughout 2000, 3dfx was hemorrhaging cash, debt was piling up, and losses were accelerating. Eventually, 3dfx's management concluded the company could not sustain its existing operations. At its November, 2000 meeting, 3dfx's board of directors met with bankruptcy counsel to confront the sobering reality that 3dfx's cash would run out by mid-December 2000. It had to find a transaction that would enable the company to meet its financial obligations.

In consultation with its investment banker, the board concluded that the first choice was to recruit a merger partner. For all the board's gold-plated connections, however, no one in the market had any interest in acquiring, or merging with, 3dfx's broken business. Nor could 3dfx find an investor to infuse the struggling business with cash. The only viable

deal it found was with Respondents NVIDIA Corporation and NVIDIA US Investment Company (collectively, "NVIDIA"). NVIDIA agreed to purchase many of 3dfx's assets. In December, 2000, NVIDIA entered into an Asset Purchase Agreement, in which NVIDIA purchased those 3dfx assets for $70 million in cash, plus a possible transfer of stock that was contingent on other events. This transaction was a giant step toward achieving the board's ultimate objective: After consideration of all other alternatives available to 3dfx, the board concluded that the liquidation, winding up and dissolution of 3dfx was the alternative most reasonably likely to enable 3dfx to pay its creditors and to maximize the return of value to its shareholders.

At the time of the transaction, 3dfx was renting office space from two landlords: Carlyle and CarrAmerica Realty Corporation ("CarrAmerica"). The Carlyle space was in California, and the CarrAmerica space in Texas. NVIDIA did not acquire those leases in the transaction.

The infusion of cash from NVIDIA forestalled the immediate financial crisis. But ultimately, it was not enough to help cover 3dfx's debts. More than a year after signing the Asset Purchase Agreement, 3dfx stopped paying rent to the two landlords. The landlords therefore decided to sue NVIDIA to make them whole.

In 2002, the two landlords filed suit in California state court against NVIDIA and some of its officers and directors (together with the individual defendants in the Carlyle complaint, the "NVIDIA

Respondents") as well as 3dfx's officers and directors. The landlords alleged that 3dfx could not make rent because NVIDIA had paid 3dfx too little for its assets a year earlier. If only NVIDIA had paid more, the landlords asserted, 3dfx would not have defaulted on its rent. Carlyle, the landlord whose claim is before the Court in this appeal, alleged, among other things, that by paying too little, NVIDIA tortiously interfered with the lease agreement, violated the Uniform Fraudulent Transfer Act, and was liable on the lease under theories of successor liability.

3dfx tried to effect a corporate dissolution under state law, but failed. In October, 2002, 3dfx filed a Chapter 11 bankruptcy petition in the Northern District of California. NVIDIA then removed both landlords' cases to the bankruptcy court.

The trustee for 3dfx's bankruptcy estate also sued NVIDIA, asserting fraudulent transfer and successor liability claims, just as the landlords had done. Like the landlords, the trustee complained that NVIDIA had paid too little for 3dfx's assets. The bankruptcy court consolidated the three adversary proceedings for discovery, and they all proceeded in tandem for a while. After the close of discovery in 2005, for reasons not relevant here, the district court ordered the landlord lawsuits transferred from the bankruptcy court to the district court.

Upon arriving back in the district court, both landlords amended their complaints, prompting motions to dismiss. The District Court dismissed both amended complaints for lack of standing, with leave to amend. Resp. App. 1-16. The further

amendments were no better received; in late 2006, the district court dismissed both lawsuits with prejudice for lack of standing, painstakingly reviewing each claim and concluding that all alleged injury to the debtor in the first instance, and so belonged to the estate. App. 9-34; Resp. App. 17-37. The landlords appealed to the Ninth Circuit.

While the landlords' appeals were pending, the bankruptcy court tried the trustee's case against NVIDIA. The object of that trial was to determine the value of the assets that 3dfx had conveyed to NVIDIA in the Asset Purchase Agreement, so as to assess whether NVIDIA had paid "reasonably equivalent value" as required under controlling state law. The bankruptcy court issued an 87-page memorandum opinion finding that NVIDIA had paid more than twice the fair market value of the assets it purchased from 3dfx, and thus had caused the estate (and its creditors) no harm. *Brandt v. NVIDIA Corporation (In re 3dfx Interactive, Inc.)*, 389 B.R. 842, 887-88 (Bankr. N.D. Cal. 2008). The trustee's appeal to the district court is pending.

On review of the order dismissing the landlords' cases, the Court of Appeals reached a split decision. It affirmed the dismissal of Carlyle's complaint entirely. The Court of Appeals observed that the gravamen of Carlyle's complaint was that NVIDIA injured *the debtor* (3dfx) by dissipating the debtor's assets. App. 6. According to the court, all of Carlyle's alleged injuries flowed derivatively from the harm to the debtor, not harm that NVIDIA inflicted directly on Carlyle. App. 6. Under existing Ninth Circuit precedent, this meant that only *the trustee* had standing to recover, because the trustee

is exclusively responsible for pursuing claims involving injury to the debtor. *See Smith v. Arthur Anderson*, 21 F.3d 989, 1004 (9th Cir. 2005). A creditor whose injury derives only from harm to the debtor does not have standing to sue directly. That creditor must stand in line with all the other creditors and recover only its fair aliquot of the funds the trustee recovers from such claims.

The Court of Appeals reached a different conclusion as to some of CarrAmerica's claims. It held that CarrAmerica had pled certain direct injuries that were particular to CarrAmerica, and not derivative of any injury to 3dfx. App. 7-8. That meant that the trustee could not bring those claims, and CarrAmerica had standing to bring them directly against NVIDIA. App. 8. CarrAmerica has not sought review as to the claims that have been dismissed.

Carlyle filed a petition for rehearing *en banc* and a motion for clarification in the Court of Appeals. The court denied rehearing *en banc*, with not a single judge requesting a vote on Carlyle's petition. App. 37. However, in response to Carlyle's motion for clarification, the Court of Appeals remanded Carlyle's case to determine whether the trustee had abandoned the estate's property interest in any of the claims Carlyle had asserted against NVIDIA. App. 36-37. The bankruptcy court has since concluded that the trustee had not abandoned any of its claims. En route to that conclusion, the bankruptcy court chided Carlyle for securing the remand from the Court of Appeals through a "lack of candor" in its motion for clarification. *See In re 3dfx Interactive, Inc.*, No. 02-55795 RLE (Bankr. N.D.

Cal.) (Hearing held, May 13, 2009, Docket No. 1129; transcript at p. 49:4-11).

REASONS FOR DENYING THE PETITION

Carlyle presents four questions that it purports to find in the Court of Appeals' short, unpublished opinion. None of them is worthy of this Court's review.

The first is a question about whether a trustee has standing to assert claims that belong to all creditors. That question is not presented here, because the Court of Appeals held that the claims at issue do *not* belong to the creditors. And, in any event, the circuit conflict Carlyle describes is illusory. *See infra* Point I.

The second question is whether this Court should adopt a peculiar rule about trustee standing that no court other than the Second Circuit has ever adopted. The issue is not cert.-worthy because the Second Circuit rule is the product of New York state law, and California law (which governs here) is different. *See infra* Point II.

The remaining two questions are utterly unworthy of this Court's attention. Question 3 is a bankruptcy law question so esoteric that, according to Carlyle, no court other than the Ninth Circuit has ever addressed it. This Court should deny certiorari for that reason alone. *See infra* Point III.

Finally, Carlyle inexplicably asks this Court to decide a state law question about an application of the statute of frauds to a specific set of facts, the very antithesis of a cert.-worthy question. *See infra* Point IV.

I. THIS CASE DOES NOT PRESENT A CERT.-WORTHY CONFLICT ABOUT WHETHER TRUSTEES HAVE STANDING TO BRING "GENERAL" CLAIMS ON BEHALF OF ALL CREDITORS.

Carlyle purports to present this Court with an opportunity to resolve an asserted circuit conflict about whether a bankruptcy trustee has standing to bring claims on behalf of all creditors. Carlyle sees ambiguity in this Court's holding in *Caplin v. Marine Midland Grace Trust Co.*, that "nowhere in the statutory scheme is there any suggestion that the trustee in reorganization is to assume the responsibility of suing third parties on behalf of debenture holders," a class of creditors. 406 U.S. at 428. Carlyle presents the question "whether a bankruptcy trustee lacks standing to sue on behalf of creditors *generally* or only *a certain class* of creditors," such as debenture holders. Pet. 12 (emphasis added). The petition depicts two nearly equal camps aligning on either side of the question.

Carlyle is mistaken because: (A) this case does not present that question; and (B) the purported circuit conflict is illusory.

A. This Case Does Not Present the Issue Carlyle Purports to Present.

The conflict Carlyle seeks to present arises only in the specific context where a trustee "assume[s] the responsibility of suing third parties *on behalf of*" creditors. *Caplin*, 406 U.S. at 428 (emphasis added). Only where the trustee is presenting claims that

actually *belong to* creditors does the debate arise over whether the trustee is ever allowed to do so, and, if so, under what circumstances. Only in that circumstance does a court confront the choice between: (1) a rule that the trustee has standing to bring claims on behalf of creditors, but only if the claims belong *generally* to *all* creditors; and (2) a rule that the trustee *never* has standing to press claims on behalf of creditors, even if the claims belong generally to all creditors.

This case does not present this Court with the opportunity to choose between these alternative rules, because the necessary precondition is missing. Contrary to Carlyle's assertion, the Court of Appeals did not "read *Caplin* broadly and for the proposition that a bankruptcy trustee cannot bring 'general' creditor claims." Pet. 12. The Court of Appeals did not interpret *Caplin*, and did not address the question whether a trustee can ever bring a claim *on behalf of* creditors. Rather, it held that the claims in question did not belong to creditors at all—not to all creditors generally and not to a subclass of creditors. The court could not have been clearer: "While the Creditors were harmed by the alleged diminution of 3dfx's estate, depleting the assets available for the bankruptcy estate *constitutes an injury to the bankrupt corporation itself, not an individual creditor of that corporation.*" App. 6 (emphasis added). In light of that conclusion, the Court of Appeals did not apply the *Caplin* rule, but a different rule entirely: "[T]he Trustee has exclusive standing to sue with respect to all claims asserted by Creditors based on an underlying injury to [the debtor]." App. 5-6.

Carlyle does not take issue with this rule. And for good reason. Whatever uncertainty there might be as to a trustee's power to bring claims that belong to *creditors*, every circuit to address the issue—at least ten in all—agrees that the trustee has exclusive authority to bring claims that belong to the *debtor*, and that a claim based on an injury to the debtor is a claim that belongs to the debtor, not to creditors.[2] Carlyle does not cite a single case that holds otherwise.

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[2] *See Smith*, 421 F.3d at 1004 (trustee has exclusive standing where injury to creditors results from "the economic reality that any injury to an insolvent firm is necessarily felt by its creditors"); *Official Committee of Unsecured Creditors v. R.F. Lafferty & Co., Inc.*, 267 F.3d 340, 347-48 (3d Cir. 2001) (bankruptcy estate representative has standing where injury to creditors was not "separately cognizable" from injury to debtor); *Schimmelpennick v. Byrne (In re Schimmelpennick)*, 183 F.2d 347, 358-61 (5th Cir. 1999) (creditor has no standing to bring claims based on injury to debtor that affected creditor derivatively); *Bivens Gardens Office Bldg., Inc. v. Barnett Banks of Fla., Inc.*, 140 F.3d 898, 908 (11th Cir. 1998) (creditor lacks standing "if the injury alleged was suffered only as a result of harm to the corporation"); *Honigman v. Comerica Bank (In re van Dresser Corp.)*, 128 F.3d 945 (6th Cir. 1997) (creditor lacks standing because injury was derivative of harm to debtor corporation); *Steinberg v. Buczynski*, 40 F.3d 890, 893 (7th Cir. 1994) (a trustee enforces a creditor's interest in claims where they are derivative of the debtor corporation's claims); *Kalb, Voorhis & Co. v. Am. Fin. Corp.*, 8 F.3d 130, 132 (2d Cir. 1993) ("If a claim is a general one, with no particularized injury arising from it, and if that claim could be brought by any creditor of the debtor, the trustee is the proper person to assert the claim, and the creditors are bound by the outcome of the trustee's action."); *St. Paul Fire and Marine Ins. Co. v. PepsiCo Inc.*, 884 F.2d 688, 704 (2d Cir. 1989) (creditor lacked standing where its injury "alleged a secondary effect from harm done to"

This rule derives from the trustee's bedrock duty to collect the property of the estate and reduce it to money. *See* 11 U.S.C. § 704(1). As the Fifth Circuit has explained:

> If a cause of action alleges only indirect harm to a creditor (i.e., an injury which derives from harm to the debtor), and the debtor could have raised a claim for its direct injury under the applicable law, then the cause of action belongs to the estate. (citations omitted) Conversely, if the cause of action does not explicitly or implicitly allege harm to the debtor, then the cause of action could not have been asserted by the debtor as of the commencement of the case, and thus is not property of the estate.

Schertz-Cibolo-Universal City, Indep. School Dist. v. Wright (In re Educators Group Health Trust), 25 F.3d 1281, 1284 (5th Cir. 1994).

Not only is this rule consistent with *Caplin*, but it is a necessary corollary to the *Caplin* rule. As the Third Circuit has explained:

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the debtor); *Regan v. Vinick & Young (In re Rare Coin Galleries of Am., Inc.)*, 862 F.2d 896, 900-01 (1st Cir. 1988) (trustee has standing when alleging claims based on injury to debtor, even though wrongdoing caused debtor's customers to lose money); *Steyr-Daimler-Puch of Am. Corp. v. Pappas*, 852 F.2d 132, 136 (4th Cir. 1988) (creditor lacked standing to bring claim where injury is to debtor corporation under state law); *Delgado Oil Co., Inc. v. Torres*, 785 F.2d 857, 862 (10th Cir. 1986) (claim based on transferring assets from corporation states injury to corporation, and so belongs to trustee, not individual creditor).

> Simply because the creditors of a[n] estate may be the primary or even the only beneficiary of such a recovery does not transform the action into a suit by the creditors. Otherwise, whenever a lawsuit constituted property of an estate which has insufficient funds to pay all creditors, the lawsuit would be worthless since under *Caplin* it could not be pursued by the trustee.

Lafferty, 267 F.3d at 348-49 (quotation and citation omitted).

To say that the courts universally agree on the baseline rule does not mean that the rule is always easy to apply. Sometimes seemingly inconsistent outcomes are attributable to the fact that state law dictates whether a claim belongs to the debtor or the creditor. *See Butner v. Unites States*, 440 U.S. 48, 54 (1979).[3] Other times, different outcomes are attributable to subtle differences among the claims being assessed.[4] Carlyle is incorrect in saying that

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[3] *Compare, e.g., Kalb*, 8 F.3d at 132 (alter ego claim belongs to corporation under Texas law, so claim was exclusive to trustee and creditor lacked standing), *St. Paul Fire*, 884 F.2d at 703-4 (same under Ohio law), *and CBS, Inc. v. Folks (In re Folks)*, 211 B.R. 378, 385 (B.A.P. 9th Cir. 1997) (same under California law), *with Mixon v. Anderson (In re Ozark Restaurant Equip. Co.)*, 816 F.2d 1222, 1225 (8th Cir.) (alter ego claim belongs to creditor under Arkansas law, so trustee lacked standing), *cert. denied*, 484 U.S. 848 (1987).

[4] *See, e.g., Shearson Lehman*, 944 F.2d at 119-20 (under New York law, a "churning" claim belonged to the corporation, so the trustee had exclusive standing to bring it, but the trustee

the various cases it cites "cannot be reconciled." Pet. 15. But the more important point, for present purposes, is that these cases all articulate and apply the same rule that the Ninth Circuit followed here.[5] If there are any irreconcilable outcomes, they are a function not of confusion as to what the rule is, but inevitable disagreements as to how to apply it to a new set of facts.

Carlyle does not seek certiorari to review the Court of Appeals' conclusion that Carlyle's suit "constitutes an injury to the bankrupt corporation itself, not an individual creditor of that corporation." App. 6. Yet, at points its petition appears to dispute that holding. *See* App. 17 (arguing that "the rights under a lease accrue only to the landlord, not to creditors of the tenant"). To the extent Carlyle seeks review of that holding, this Court should reject the invitation to delve into a fact-bound determination that revolves around particulars of state law.

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lacked standing to bring a second claim that alleged damage only to "client of" the debtor).

[5] *See, e.g., Koch Refining v. Farmers Union Cent. Exchg., Inc.*, 831 F.2d 1339, 1349 (7th Cir. 1987) (trustee has exclusive standing to bring a claim that alleged injury to the debtor-corporation because the creditor-claimant "had been injured only in an indirect manner"); *Steinberg*, 40 F.3d at 892-93 (holding that the trustee lacked standing because "the only injured person here is the [creditor]," and "[w]hen a third party has injured not the bankrupt corporation itself but a creditor of that corporation, the trustee in bankruptcy cannot bring suit against the third party").

B. The Purported Circuit Split Carlyle Claims to Present Is Illusory.

Even if this case did present the question Carlyle poses, and even if the Court of Appeals had addressed it, the question would not be worthy of this Court's consideration. The circuits do not disagree as to whether, under 11 U.S.C. § 541(a), a trustee has standing to bring a claim that belongs to creditors. Their uniform answer is no. No circuit has upheld standing for a trustee bringing a claim that actually belongs to creditors—i.e., a claim that is premised on direct harm to the creditors, as opposed to harm that is derivative of harm to the bankrupt debtor.

Carlyle does not cite a single case that reaches the opposite conclusion. It cites no case upholding a trustee's standing to press a claim that actually belongs to the creditors, and no case barring creditors from bringing a claim that belongs to them.

Instead, Carlyle performs the verbal equivalent of an amateur parlor trick. It tries to create the illusion of a conflict by stringing together several isolated quotes that seem superficially contradictory—until you stare at them a few seconds longer. These snippets are to the effect of: "[i]f a claim is a general one, with no particularized injury arising from it, . . . the trustee is the proper person to assert the claim," *Kalb, Voorhis & Co.*, 8 F.3d at 132, or "[a] trustee may maintain only a general claim," *Koch Refining*, 831 F.2d at 1349. Not a single one of these cases holds that a bankruptcy trustee *does* have standing to press claims on behalf of creditors—claims where the creditors, not the

debtor, were the subject of the injury. Rather, in each situation, Carlyle's misdirection consists of exploiting different uses of the word "general." These snippets use the word "general" as a synonym for "derivative." They use the phrase to describe an injury to the *debtor* that happens to have inflicted harm on all the creditors. In this usage, the "general claim" is distinguished from a "personal" or "particularized" claim, in which injury was inflicted directly on a particular creditor. In these passages, trustees bring "general" claims in the sense that their recoveries benefit all creditors generally—not in the sense that they are asserting claims, *on behalf of* creditors, that actually *belong to* all creditors.

One good example of this usage is *In re Folks*, 211 B.R. 378, which Carlyle features as a poster-child for the proposition that trustees may bring general claims on behalf of creditors. *See* Pet. at 13-14. The court there detailed the difference between "General v. Particularized Injury": A "general" claim, is one "with no particularized injury arising from it, *which is based upon injury to the corporate debtor* and all its creditors, rather than a personal claim belonging to any individual creditor." *Folks*, 211 B.R. at 387-88 (emphasis added).

This same distinction explains why several circuits take positions on *both* sides of the artificial dichotomy Carlyle tries to draw. *See* Pet. 14-16 (cataloguing supposed conflicts). Carlyle characterizes the duality as "Intra-Circuit Conflict[s]" (without explaining why this Court should abandon its customary practice of declining to resolve intramural conflicts within a circuit). Pet. 14. But the accused circuits do not see it that way.

Take, for example, the Seventh Circuit, which is the source of the above-quoted snippet that "[a] trustee may maintain only a general claim." *Koch Refining*, 831 F.2d at 1349. Carlyle juxtaposes this quote against a passage in a later Seventh Circuit case holding that "the trustee . . . has no right to enforce entitlements of a creditor." *Steinberg*, 40 F.3d at 893. Carlyle asserts that the two opinions "cannot be reconciled." Pet. 15. The only way to make this assertion true is to read the quotes really fast—and then ignore every word of both opinions except the quoted words. Not only can they be reconciled, but the second opinion, written by Judge Posner, explains at length exactly how to reconcile them. The key lies in getting past the imprecise nomenclature. The Seventh Circuit explained that the earlier opinion's description of claims as either "general" or "personal" was "not an illuminating usage." *Id.* at 893. The real question in that earlier case, and in all cases like this, is whether the injury befalls the creditor directly, or whether the harm to the creditor is derivative of the harm to the debtor:

> The point is simply that the trustee is confined to enforcing entitlements of the [debtor]. He has no right to enforce entitlements of a creditor. [The trustee] represents the unsecured creditors of the corporation; and in that sense when he is suing on behalf of the corporation he is really suing on behalf of the creditors of the corporation. But there is a *difference between a creditor's interest in the claims of the corporation* against a third party, which are

> enforced by the trustee, and the *creditor's own direct—not derivative—claim* against the third party, which only the creditor himself can enforce.

Id. (emphasis added).

More recently, the Fifth Circuit made the same point, resolving the confusion that arose from the same imprecise nomenclature:

> The discussion of personal and general claims . . . was not meant to work a change to th[e] well-established rule, even when the claims at issue may be brought by a number of creditors instead of just one. Rather, our point was that some claims that are usually brought by creditors outside of bankruptcy (and thus in a sense may be said to "belong to" the creditors and not the debtor) are nonetheless vested exclusively in the trustee in bankruptcy.

Highland Capital Mgmt LP v. Chesapeake Energy Corp. (In re Seven Seas Petroleum, Inc.), 522 F.3d 575, 588-89 (5th Cir. 2008). The court continued, "It is '[a]ctions by individual creditors asserting a generalized injury to the debtor's estate, which ultimately affects all creditors[,]' that can be said to raise a 'generalized grievance,' not actions by creditors that are merely common to a number of them." *Id.* at 589 (citation omitted).

In short, despite variations in terminology, these courts uniformly apply the same rule—the very rule the Ninth Circuit applied in this case. This Court

need not grant certiorari to align the lower courts around a single lexicon—particularly since they are already falling into line of their own accord.

II. THE VALIDITY OF THE *WAGONER* RULE IS NOT A CERT.-WORTHY QUESTION.

Carlyle next urges the Court to resolve the validity of the so-called "*Wagoner* rule," as articulated by the Second Circuit in *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114 (2d Cir. 1991). The Ninth Circuit declined to follow the rule in this case. App. 7. This Court should refuse Carlyle's invitation for three reasons: (A) the issue is merely a variation of the first question, which itself is not cert.-worthy; (B) the *Wagoner* rule is a product of the application of state law; and (C) the Wagoner rule does not apply—and has never been applied—in circumstances like these.

A. The Second Question Is Merely A Variant Of The First Question Concerning Ownership Of Claims.

The *Wagoner* rule, as the Second Circuit articulates it, is as follows: "A claim against a third party for defrauding a corporation with the cooperation of management accrues to the creditors, not to the guilty corporation." *Id.* at 120. As noted in Part I, a bankruptcy trustee's standing to sue third parties depends upon whether the claim being pursued is property of the bankruptcy estate. 11 U.S.C. §704(1) ("trustee shall . . . collect and reduce to money the property of the estate . . ."); §541(a)(1) (defining "property of the estate" to

include any interest in property that the debtor had as of the commencement of the bankruptcy case). Whether a cause of action is property of the estate belonging to the trustee, or belongs to creditors, is a question of state law. *Barnhill v. Johnson,* 503 U.S. 393, 398 (1992). On its face, *Wagoner* is merely an articulation of one circumstance in which a creditor might be found to own a claim that, in other jurisdictions, would belong to the bankruptcy estate.

In other words, Carlyle's protest of the Ninth Circuit's refusal to adopt the Second Circuit's *Wagoner* rule in this case reflects Carlyle's confused thinking about the dispositive analysis: (a) What determines a party's standing to sue is whether that party owns the claims it would assert; (b) where a bankruptcy is implicated, ownership of the claims depends upon analysis of whether that claim is property of the estate; and (c) what constitutes property of the estate is largely a question of state law. Therefore, if the claim the creditor would assert is, under the relevant state law analysis, property of the bankruptcy estate, the creditor does not own the claim and lacks standing to pursue it. If it is not property of the estate, then the creditor must still demonstrate ownership to establish standing, but at least is not foreclosed by the bankruptcy trustee's exclusive standing.

As we observed above, *see supra* Point I, every circuit in the country follows this analytical framework. The Second Circuit's *Wagoner* rule is nothing more than a part of that analysis, applied in circumstances where New York law controls and the debtor and the defendant were in cahoots. This is, therefore, still a debate about the first question: who

owns the claims that Carlyle would assert? The second question thus presents no more compelling a case for certiorari than the first.

B. The Wagoner Rule is the Product of New York State Law.

Carlyle describes the disagreement between the Second Circuit and other circuits over whether to apply the *Wagoner* rule as an "irreconcilable inter-circuit conflict." Pet. 25. In truth, the conflict is nothing of the sort; state law differences account entirely for the different results.

Under *Wagoner*, as a matter of New York state law the property of the bankruptcy estate does not include claims against third parties for injuries caused by the misconduct of the debtor's controlling managers. *See Ernst & Young v. Bankruptcy Services, Inc., (In re CBI Holding Co.)*, 529 F.3d 432, 447 (2d Cir. 2008) ("**Under New York law**, '[a] claim against a third party for defrauding a corporation with the cooperation of management accrues to the creditors, not to the guilty corporation.'") (emphasis added); *Mediators, Inc. v. Manney (In re Mediators, Inc.)*, 105 F.3d 822, 826 (2d Cir. 1997) ("In *Wagoner*, we held that, **under New York law**, a bankruptcy trustee had no standing to sue Shearson Lehman Hutton for aiding and abetting the unlawful investment activity of . . . the president and sole shareholder of a bankrupt corporation.") (emphasis added). While the Second Circuit in *Wagoner* did not explain its rationale for the rule, lower courts have surmised that it derives from the application of New York's state law equitable affirmative defense of *in pari delicto*,

which prohibits a company from suing someone else for injuries that the company's own management helped inflict. *See, e.g., Schertz-Cibolo-Universal City v. Wright (In re Adelphia Commc'ns Corp.)*, 365 B.R. 24, 45 (Bankr. S.D.N.Y. 2007); *Buchwald v. The Renco Group, Inc., (In re Magnesium Corp. of Am.)*, 399 B.R. 722, 764 (Bankr. S.D.N.Y. 2009); *but see Official Committee of the Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 f.3d 147, 157 (2d Cir. 2003) ("*Wagoner* had nothing to do with affirmative defenses."). Thus, New York state law conflates the equitable defense of *in pari delicto* with questions of standing, and analyzes the questions together.

At bottom, Caryle's lament is that its claims are not governed by New York law, where it might have benefited by application of the *Wagoner* rule. This case, however, is governed by California law. Unlike New York, most other jurisdictions—including California—treat questions of standing and the affirmative defense of *in pari delicto* as "analytically distinct concepts." *See Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP*, 133 Cal. App. 4th 658, 677 (2005) ("Although some cases have considered the bankrupt entity's unclean hands (generally referred to in federal decisions as *in pari delicto* doctrine) as an element of standing, they are analytically distinct concepts.") (citations omitted).[6]

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[6] *See also Moratzka v. Morris (In re Senior Cottages of America, LLC)*, 482 F.3d 997, 1003 (8th Cir. 2007); *Baena v. KPMG*, 453 F.3d 1, 7 (1st Cir. 2006) (*in pari delicto* has nothing to do with standing); *Official Comm. Of Unsecured Creditors of PSA, Inc. v. Edwards*, 437 F.3d 1145, 1149 (11th Cir. 2006) ("an analysis

In *Peregrine*, the California Court of Appeals found that a trustee enjoyed standing to bring his claims, but that the unique procedural context of that case permitted a dismissal. The defendant filed a special motion to strike that, under the relevant California statute, shifted the burden to the plaintiff to show a probability of success on the merits. The trustee's complaint contained sufficient allegations of misconduct by the debtor—which the Court termed "admissions"—to support the *in pari delicto* affirmative defense, so the court adjudicated the matter on that basis. Plainly, a California court would treat *in pari delicto* as a defense, and not divest a trustee of ownership of the claim, and so standing. The nuances of individual states' applications of the *in pari delicto* defense, while perhaps worthy of a law school student note, do not compel certiorari review.

The Court of Appeals in this case correctly determined that notions of *in pari delicto* do not divest a bankruptcy trustee of exclusive standing to pursue claims otherwise owned by the estate. That a court applying New York law might reach a different conclusion is neither remarkable nor worthy of this Court's attention.

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of standing does not include an analysis of equitable defenses, such as *in pari delicto*"); *Lafferty*, 267 F.3d at 346 ("whether a party has standing to bring a claim and whether a party's claims are barred by an equitable defense are two separate questions"); *In re Educator's Group Health Trust*, 25 F.3d 1281, 1286 (5th Cir. 1994) (rejecting "the proposition that a defense on the merits of a claim precludes the debtor from bringing the claim.")

C. The Wagoner Rule Does Not Apply in the Circumstances Here.

Carlyle also asks this Court to rule on a unique and unprecedented application of the *Wagoner* rule. Carlyle invokes the *in pari delicto* doctrine, shorn from its legal context or any understanding of its function, to argue that a different plaintiff in an entirely independent lawsuit should be divested of standing to prosecute that second action. Carlyle cites no cases applying the rule in this manner, and for good reason: no bankruptcy trustee could ever pursue claims of the debtor against any person if a creditor could divest the trustee of standing by the simple expedient of filing its own lawsuit against the same defendant, and fill it with artful allegations that the defendant and the debtor were collaborators in the wrongs that led to the debtor's insolvency.

Certainly, research has uncovered no cases in which a court has ever divested a trustee of standing in his lawsuit as a result of allegations made by a creditor in an entirely different and separate lawsuit. The argument is especially peculiar here where the trustee's lawsuit has been adjudicated to judgment without consideration of any *in pari delicto* defense. Rather, in every case in which the *Wagoner* rule has been considered, it is asserted by a defendant against a trustee to dismiss the trustee's complaint. The *Wagoner* rule simply has no applicability in the circumstances here.

III. THIS COURT SHOULD NOT REVIEW AN ISSUE OF FIRST IMPRESSION ABOUT WHEN A LANDLORD MAY EVADE A STATUTORY CAP ON LANDLORD CLAIMS.

Carlyle's third question is: "As between a Chapter 11 reorganization trustee and creditor of the estate, does a creditor (landlord) have standing to pursue claims against a third party for lease damages in excess of the 11 U.S.C. § 502(b)(6) 'cap.'" Pet. ii. Carlyle breathlessly announces that this is a "question of first impression," Pet. 30—not just for the courts of appeals, but for any court anywhere. It adds that "[d]espite extensive research, Carlyle did not find any case law addressing th[is] question," other than the Ninth Circuit's unpublished opinion in this case. Pet. 27. Trying to win certiorari on this basis is like trying to gain admission to Heaven by announcing, "I've never done anything good."

That is reason alone to deny admission. Carlyle offers no reason for this Court to depart from its custom of reviewing only those issues that have fully percolated in the courts of appeals. Certainly, the question whether a landlord may evade the statutory cap of 11 U.S.C. § 502(b)(6) is not the sort of earth-shattering issue of such profound and urgent importance that it cries out for immediate resolution without the benefit of lower court vetting.

The most that Carlyle offers is that "[t]he Ninth Circuit's reasoning is erroneous." Pet. 28. But until this Court decides to transform into a court of errors, that is a singularly unpersuasive reason.

In any event, the claim of error is irrelevant, and incorrect. It is irrelevant because the Ninth Circuit rejected Carlyle's claim on the basis of an alternative ground, rooted entirely in state law. It held that regardless of the outcome of the bankruptcy law question, "[t]he district court properly held that the California statute of frauds barred Carlyle's claim that NVIDIA is liable for damages above the cap because Carlyle's complaint failed to allege there was a written assumption of the lease signed by NVIDIA." App. 7. In fact, this state law ground was *the* reason that the district court invoked for rejecting Carlyle's claim for rent in excess of the cap; it assumed that Carlyle had standing to sue NVIDIA, but dismissed the claim as precluded by the statute of frauds (App. 24-26) and on other state law grounds. App. 19-20. Since this Court does not sit to resolve issues of state law, *see infra* Point IV, nothing it says about the statutory cap will have any effect on the outcome of this case.

The claim of error, moreover, is incorrect, because the Court of Appeals' analysis was spot on. Nothing in "§ 502(b)(6) gives rise to a particularized injury that divests the Trustee of standing." App. 6-7. The provision does not constrain the powers of the trustee or limit his standing in any way. Rather, it limits the allowance of *claims* that belong to secured creditors. "[S]o the cap impairs the Creditors' claims regardless of whether the Trustee or the Creditors pursue the claim." App. 7. Moreover, the cap is not itself an "injury"; it is a function of the application of the Bankruptcy Code's legislatively mandated claims allowance process; it has no bearing on whether Carlyle has standing to sue. *See Smith*, 421 F.3d at

1004-5 (disparate treatment of creditors based on application of the Bankruptcy Code "irrelevant" to question of standing).

IV. THE COURT SHOULD NOT REVIEW A QUESTION OF STATE LAW ABOUT CALIFORNIA'S STATUTE OF FRAUDS.

Carlyle's final argument is that "review is necessary to determine whether the Ninth Circuit erred in finding that e-mails cannot satisfy the statute of frauds." Pet. 31 (capitalization omitted). This conclusion, Carlyle asserts, "is contrary to California statute and case law." *Id.* This is the antithesis of a cert.-worthy issue (and Carlyle is wrong anyway). The state law issue does not become any more cert.-worthy just because Carlyle says that the supposed error is "manifest." Pet. 33.

CONCLUSION

For the foregoing reasons, the Court should deny Carlyle's petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

IN THE UNITED DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA
SAN JOSE DIVISION

CARLYLE FORTRAN TRUST,	NO. C 05-00427 JW
Plaintiff,	**ORDER DISMISSING**
v.	**THIRD AMENDED**
NVIDIA CORPORATION, et al.,	**COMPLAINT WITH LEAVE TO**
Defendants.	**AMEND; SETTING FURTHER CASE MANAGEMENT CONFERENCE**

I. INTRODUCTION

The former directors and officers of 3dfx Interactive, Inc. (3dfx Defendants), the nVidia individual defendants, and nVidia Corporation, nVidia U.S. Investment (nVidia Defendants), (collectively "Defendants") seek dismissal of the newly asserted claims set forth in the Third Amended Complaint ("TAC") filed by Carlyle Fortran Trust ("Carlyle"). On October 18, 2005, this Court held a hearing on Defendants' motions. For the reasons set forth below, this Court dismisses the claims in the TAC for lack of standing and grants

Carlyle leave to amend in accordance with this Order.

II. BACKGROUND

Based upon the papers filed by the parties, the following facts are uncontested: 3dfx was a public company in the business of developing and selling graphic chips, graphics boards, and related technology. Pursuant to a lease dated August 7, 1996, Carlyle leased approximately 77,000 square feet of commercial space in San Jose, California to 3dfx. nVidia was a competitor of 3dfx also in the business of developing and selling graphics technology. In late 2000, nVidia and 3dfx structured and entered into an Asset Purchase Agreement ("APA") where nVidia paid $70 million in cash plus 1,000,000 shares of nVidia common stock for certain assets of 3dfx including its portfolio of patents, trademarks, and applications. The APA also provided that 3dfx would dissolve after consummating its transaction with nVidia. The parties dispute the exact effects and motivations behind the structuring of the APA's terms.

On January 1, 2002, 3dfx ceased paying rent. Carlyle filed a complaint in the Santa Clara County Superior Court against 3dfx, nVidia and their respective directors and officers for, inter alia, intentional interference with contract, fraudulent transfer, and unfair business practices. 3dfx then filed for relief in bankruptcy under Chapter 11. On January 3, 2003, the nVidia Defendants removed Carlyle's State Court action to the Bankruptcy Court. The bankruptcy court appointed a trustee

("Trustee"), who filed a complaint against nVidia and a subsidiary. The Trustee subsequently filed an action against the 3dfx Defendants in the San Mateo County Superior Court. On September 21, 2004, the Trustee and the 3dfx Defendants entered into a Settlement Agreement and Mutual Release ("Settlement Agreement") pursuant to which the 3dfx Defendants were to pay $5.5 million. The Settlement Agreement was approved by the bankruptcy court on November 19, 2004.

By Order on May 6, 2005, this Court withdrew the reference of Carlyle's action from the Bankruptcy Court. In July of 2005, the nVidia and 3dfx Defendants filed the present motion to dismiss claims in Carlyle's TAC.

III. STANDARDS

Under Rule 12(b)(6), a plaintiff's claims or entire complaint may be dismissed by the court for "failure to state a claim upon which relief can be granted." Rule 12(b)(6). See, e.g., Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, 407 F.3d 1027, 1032 (9th Cir. 2005) (affirming district court's partial Rule 12(b)(6) dismissal). A Rule 12(b)(6) motion tests the legal sufficiency of the claims stated in the complaint. The court must decide whether the facts alleged, if true, would entitle plaintiff to some form of legal remedy. Unless the answer is unequivocally in the negative, the motion must be denied. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); De La Cruz v. Tormey (9th Cir. 1978). In resolving a Rule 12(b)(6) motion, the court must (1) construe the complaint in the light most

favorable to the plaintiff, (2) accept all well-pleaded factual allegations as true, and (3) determine whether plaintiff can prove any set of facts to support a claim that would merit relief. Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996). Because of the liberal federal pleading rules, a 12(b)(6) dismissal is proper only in "extraordinary" cases. U.S. v. Redwood City, 640 F.2d 963, 966 (9th Cir. 1981).

IV. DISCUSSION

As an initial matter, Carlyle must have standing to pursue the claims it asserts in the TAC. Defendants contend that Carlyle has no standing to bring certain claims in the TAC, because such claims belong exclusively to the Trustee.[1] Carlyle argues that the Trustee has no standing to pursue the claims in the TAC because these claims do not belong to the debtor. Contrary to Carlyle's position, the law of the Ninth Circuit requires that this Court dismiss the general claims in the TAC for lack of standing.

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[1] In the motions presently before the Court, Defendants do not apply their standing argument to every claim in the TAC. However in the interests of judicial efficiency, and in accordance with a district court's "power and...duty to raise the adequacy of [plaintiff]'s standing sua sponte," Bernhardt v. County of Los Angeles, 279 F.3d 862, 868 (9th Cir. 2002), this Court will determine Plaintiffs' standing as to each claim in the TAC.

Under California law as interpreted by the Ninth Circuit, the authority to pursue a debtor's general causes of action is delegated exclusively to the bankruptcy trustee, unless the creditor can show particularized injury. In re Folks, 211 B.R. 378 (9th Cir. BAP 1997). In In re Folks, the Ninth Circuit held that the bankruptcy trustee has exclusive jurisdiction for general claims: "If a claim is a general one, with no particularized injury arising from it, and if that claim could be brought by any creditor of the debtor, the trustee is the proper person to assert the claim, and the creditors are bound by the outcome of the trustee's action." Id. at 386. In so doing, the Ninth Circuit defined personal claims as those held by the creditor, and distinguished these personal claims from general claims over which the bankruptcy trustee has exclusive standing:

> A cause of action is personal if the claimant himself is harmed and no other claimant or creditor has an interest in the case. A general claim exists if the liability is to all creditors of the corporation without regard to the personal dealings between such officers and creditors.

Id. at 386 (citations and quotations to Koch v. Farmers Union Cent. Exchange, Inc., 831 F.2d 1339 (7th Cir. 1987) omitted). More recently, the Ninth Circuit has expanded the holding of In re Folks to grant standing to a bankruptcy trustee where the trustee alleged that defendants' "dissipation of assets limited the firm's ability to pay creditors." In

re Smith, 421 F.3d 989, 1004 (9th Cir. 2005). Recognizing that "the economic reality that any injury to an insolvent firm is necessarily felt by its creditors," the Ninth Circuit in In re Smith nevertheless held that the defendants' acts in dissipating corporate assets gave rise to a general claim. Id. [2]

A. Claims in the TAC Based on Dissipation of Assets Caused by the APA

A number of the claims in the TAC are based on the general allegation that the structure of the APA dissipated the amount of assets available to pay all creditors. For example, claims 1 and 2 allege that the dissolution of 3dfx, and 3dfx's subsequent inability to pay rent interfered with the contractual

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[2] At the hearing on October 18, 2005, and in Plaintiff's Motion for Leave to File (Docket No. 129), Carlyle argued that In re Smith supports its position because the Ninth Circuit did not expressly grant the bankruptcy trustee *exclusive* standing. First, even if Carlyle is correct that In re Smith only held that the trustee has standing along with the creditors, the holding in In re Folks granting the bankruptcy trustee exclusive standing for general creditor claims has not been superceded by other Ninth Circuit or Supreme Court decisions. Second, on this Court's reading of In re Smith, the trustee action was the only case before the Ninth Circuit, and thus it had no jurisdiction to deny standing to a separate action involving plaintiffs before a Colorado court.

and economic relations between 3dfx and Carlyle. As alleged, however, these claims are not particular to Carlyle. The dissolution of a corporation where liabilities exceed assets rendering the corporation unable to fulfill its obligations, is at the heart of bankruptcy. The exact injury to each creditor as a result of the dissolution of an insolvent corporation may vary, but this variation does not make the injury "particularized" within the meaning of the term as used by the Ninth Circuit. Since the injury caused by the dissolution of 3dfx with insufficient assets to pay its obligations is "to all creditors of the corporation without regard to the personal dealings between such officers and creditors," In re Folks, 211 B.R. at 386, the Trustee has exclusive jurisdiction to assert the claims arising out of the allegedly APA-caused dissolution of 3dfx.

In its papers, Carlyle points to its allegations in ¶¶ 86-88 as particularized claims. In these paragraphs, Carlyle alleges that at the time of the APA, Defendants agreed that nVidia or its subsidiary would be assuming the Lease, but shortly before Defendants closed the asset purchase transaction at issue, nVidia and its subsidiary refused to assume the Lease. However, the core of these allegations is a general creditor claim of simply increased general liability based on Defendants' refusal to assume the lease. Carlyle states that nVidia "refused to assume the Lease, thereby leaving 3dfx with an additional liability in excess of $7 million without any additional Cash Consideration or Stock Consideration to deal with such liability." (TAC ¶ 87.) The dissipation of corporate assets resulting from an additional $7

million in liabilities is a harm to the bankruptcy estate common to all creditors. See In re Smith, 421 F.3d at 1004. Accordingly, the Trustee has exclusive jurisdiction over the claims in ¶ 86-88 that are based on additional liabilities of the estate.

B. Claims Based on Insufficient Consideration Provided by the APA for 3dfx's Assets.

To the extent that the claims in the TAC are based on an allegation that the APA provided insufficient consideration for 3dfx's assets, the claims are general and are also to be exclusively asserted by the Trustee. For example, claims 3-5 for fraudulent transfer are primarily based on Carlyle's allegations that the APA provided "inadequate value" for 3dfx's assets. Such claims based on the amount of consideration provided under the APA for the assets of 3dfx are general claims which could be brought by any creditor of the debtor. Under the rule of the Ninth Circuit in In re Folks, the Trustee has exclusive jurisdiction over claims based on insufficient consideration as a result of the APA.

Similarly, Claim 6 of the TAC alleges successor liability based on the nVidia Defendants' actions in having "acquired substantially all of the assets of 3dfx and paid inadequate consideration therefor" through the APA, and that the nVidia Defendants acted "for the fraudulent purposes of allowing 3dfx to evade its liability to Carlyle." (TAC, ¶ 138.) While a claim that an asset purchase agreement designed to escape liability from a particular creditor would ordinarily be an allegation

of particularized injury, there does not seem to be anything in the TAC that alleges that Defendants acted with Carlyle in mind. At the hearing, Carlyle argued that their injury was particularized because Defendants' due diligence prior to the APA made Defendants aware of the terms of the Lease. However, Defendants were likely aware of all creditors' contracts with 3dfx, and Carlyle does not allege that Defendants were particularly aware of the ease, or structured the APA to evade the Lease in particular. Based on the facts alleged in the TAC, any creditor could allege that the APA was "for the fraudulent purposes of allowing 3dfx to evade its liability" to any or all of the creditors. Accordingly, because Carlyle has alleged insufficient facts to support a claim that Defendants entered into the APA to evade liability to Carlyle in particular, claim 6 is also a general claim that the Trustee has exclusive standing to assert.

C. Claims Based on Breach of Fiduciary Duty and Aiding and Abetting Breach of Fiduciary Duty in Entering into the APA

As to Carlyle's claims regarding breach of fiduciary duty, Carlyle argues that it has standing because California law recognizes a fiduciary duty of the directors and officers of an insolvent corporation to its creditors. Under California law, a claim could be stated that the 3dfx Defendants breached their fiduciary duties to the creditors of 3dfx when 3dfx was in the zone of insolvency. However, Carlyle is not the proper party to assert this claim. The Ninth Circuit in In re Smith declined to rule on whether

the creditors could have asserted these claims outside the bankruptcy context "because state law often permits creditors to pursue derivative claims on an insolvent corporation's behalf when the corporation itself has been injured by breaches of fiduciary duty." 421 F.3d at 1006. The Ninth Circuit in In re Folks, however, already found that under California state law, derivative claims on an insolvent corporation's behalf are asserted exclusively by the bankruptcy trustee. 211 B.R. at 384-85. Furthermore, in the case cited by Carlyle, Saracco Tank & Welding Co. v. Platz, 65 Cal. App. 2d 305, 315 (1944), the court stated that "all of the assets of a corporation immediately on its becoming insolvent, become a trust fund for the benefit of all of its creditors." (emphasis added). Because the claim that Defendants breached their fiduciary duty by entering into an APA which did not provide enough in cash for the bankruptcy estate is general to all creditors, the rule of In re Folks that the trustee has exclusive jurisdiction to assert claims where "liability is to all creditors of the corporation" bars Carlyle from asserting a claim for breach of fiduciary duty against the 3dfx Defendants. Similarly, Carlyle's claim against nVidia Defendants that the nVidia Defendants aided and abetted the 3dfx Defendants' breach of fiduciary duty is also dismissed to the extent that such a claim is general to all creditors.

D. Claims Based on the Structure of the APA

At oral argument, Carlyle argued that the Trustee does not have an interest in the claims in

the TAC because the claims are based on the structure of the APA as unfair to creditors, and not an allegation that the APA provided insufficient consideration for 3dfx's assets.[3] In other words, Carlyle reasons that each of the general claims asserted are general *creditor* claims belonging to creditors and not to the Trustee. The injury to Carlyle allegedly arose as a result of Defendants agreeing to a deal under the APA which only provided $70 million in cash plus nVidia stock as opposed to the initial offer of $100 million in cash with no stock. By the terms of their allegations, these claims are general. Because the Ninth Circuit

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[3] This Court notes that basing the claims on an argument that the APA was structured to minimize the assets available to repay creditors while allowing the shareholders to receive valuable stock consideration may have been secondary to the insufficient consideration allegations in the TAC. For example, the central allegation in the TAC is that the APA "stripp[ed] 3dfx of substantially all of its assets for inadequate consideration," resulting in injury to Carlyle (Claims 1 and 2, TAC ¶¶ 88, 96, 100), or that "3dfx transferred such assets to [nVidia Defendants] without receiving reasonably equivalent value in consideration therefor," (Claims 3-5, TAC ¶¶ 107, 118, 129), or that the nVidia Defendants "acquired substantially all of the assets of 3dfx and paid inadequate consideration therefor," (Claim 6, TAC ¶ 138), or "under the nVidia Agreement, inadequate consideration was given for 3dfx's assets" (Claim 9, ¶ 152).

has not expressly excluded general creditor claims from the broad grant of exclusive trustee jurisdiction over general claims in In re Folks, this Court is reluctant to carve out such an exception.

Carlyle claims to find support for its standing argument in In re Smith, where the Ninth Circuit cited to Steinberg v. Buczynski, 40 F.3d 890 (7th Cir. 1994) for the proposition that "when a third party has injured not the bankrupt corporation itself but a creditor of that corporation, the trustee in bankruptcy cannot bring a suit against the third party." In re Smith, 421 F.3d at 1002-03. Carlyle's reliance on the Ninth Circuit's citation of Steinberg is misplaced. In Steinberg, a plumber's union pension fund obtained a judgment against a plumbing corporation for ERISA-required contributions. The corporation then declared bankruptcy. The bankruptcy trustee brought an adversary proceeding against the corporation's two shareholders seeking to pierce the corporate veil and hold the shareholders personally liable for the corporation's debt to the pension fund. In holding that the bankruptcy trustee did not have standing to assert this claim, the Seventh Circuit relied on the fact that the trustee had failed to allege any wrongs by the shareholders. Id. at 891. In this case, Carlyle is not simply attempting to collect on rent due prior to the 3dfx bankruptcy. The claims asserted in the TAC, instead, stem from the actions of Defendants entering into the APA and that the APA (or structure thereof) left the estate with insufficient funds to make rental payments. The Steinberg opinion itself finds that it would have granted the bankruptcy trustee standing had the trustee

sufficiently alleged that the shareholders diverted assets to their personal use thus minimizing the amount available to pay the pension fund. Id. at 892.

This Court recognizes the potential for a conflict of interest between the shareholders and the creditors when Defendants entered into the APA. However, a bankruptcy trustee, appointed after the corporation's liabilities exceed its assets, is the representative of the *bankrupt estate*. Among the trustee's duties is the obligation to "collect and reduce to money the property of the estate." 11 U.S.C. §704(1). The "property of the estate" includes "all legal or equitable interests of the debtor in property as of the commencement of the case," 11 U.S.C. §541(a)(1), including the debtor's "causes of action." In re Smith, 421 F.3d at 1002. At the time of commencement of the Chapter 11 proceedings, Defendants had already entered into the APA. Thus, the "interests of the debtor in property as of the commencement of the case" includes the interest to have the bankrupt estate consist of $100 million in cash instead of $70 million in cash. Accordingly, the diminution in assets of the bankrupt estate as a result of the structure of the APA is the debtor's cause of action properly asserted exclusively by the Trustee.

V. CONCLUSION

For the reasons set forth above, this Court dismisses the TAC. Carlyle is ordered to file a Fourth Amended Complaint limiting its claims and allegations in accordance with this Order by February 4, 2006. Failure to file a Fourth Amended

Complaint by this deadline may result in dismissal. The parties are ordered to appear before the Court on April 18, 2006 at 10:00 a.m. for a case management conference.

Dated: November 10, 2005

/s/James Ware
JAMES WARE
United States
District Judge

THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:

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Dated: November 10, 2005
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By: /s/ JW Chambers

Ronald L. Davis
Courtroom Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

CARRAMERICA REALTY CORPORATION,

Plaintiff,

v.

NVIDIA CORPORATION, et al.,

Defendants.

NO. C 05-00428 JW

Related Cases:
5 :05-cv-00427-JW
5 :05-cv-00429-JW
5 :06-cv-03 856-JW
5 :06-cv-0323 8-JW

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS CARRAMERICA'S THIRD AMENDED COMPLAINT

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I. INTRODUCTION

CarrAmerica Realty Corporation ("CARR") brought this action against nVidia Corporation ("NVIDIA"), individual nVidia executives (collectively, "NVIDIA Defendants"), and the former directors and officers of 3DFX Interactive, Inc. ("3DFX Defendants") (collectively, "Defendants"), alleging twelve causes of action related to the now dissolved 3DFX Interactive, Inc.'s ("3DFX") breach of its lease with CARR. The

Defendants move to dismiss the claims set forth in CARR's Third Amended Complaint. (hereafter, "TAC," Docket Item No. 83). The Court deemed it appropriate to take the motions under submission without oral argument. See Civ. L.R. 7-1(b). Based on the papers submitted to date, the Court GRANTS Defendants' motions.

II. BACKGROUND

On November 10, 2005, the Court dismissed CARR's Second Amended Complaint ("SAC,", Docket Item No. 27) for lack of standing, and entered an Order granting CARR leave to file a Third Amended Complaint. (Order Dismissing Second Amended Complaint With Leave to Amend; Setting Further Case Management Conference, hereafter, "November 10, 2005 Order," Docket Item No. 82.)

In its Third Amended Complaint, CARR alleges the following:

> 3DFX was a public company in the business of developing and selling graphic chips, graphics boards, and related technology. (TAC ¶ 11.)
>
> CARR leased approximately 26,000 square feet of commercial space in Austin, Texas to 3DFX on or about July 23, 1998. (TAC ¶ 8.) The lease ran through August 31, 2003. (TAC ¶ 9.)
>
> On or about December 15, 2000, 3DFX and its competitor, NVIDIA, entered into an Asset Purchase Agreement (the "Agreement")

under the terms of which at closing NVIDIA would pay to 3DFX $70 million in cash and approximately $40 million in NVIDIA stock in exchange for the transfer to NVIDIA of specified assets of 3DFX including its portfolio of patents, trademarks, and applications. The Agreement also provided that 3DFX would dissolve after closing the asset sale to NVIDIA. (TAC ¶ ¶ 13, 46.)

At the time of the Agreement, CARR had no knowledge of the agreement. (TAC ¶ 13.)

NVIDIA sought to conceal the true nature of its agreement with 3DFX by labeling the agreement an "asset purchase" because NVIDIA wanted to acquire all of 3DFX's assets without becoming liable to 3DFX's creditors which included CARR. (TAC ¶ 14.)

On or about December 15, 2000, immediately after execution of the Agreement, 3DFX ceased operations; its employees were terminated and were hired by NVIDIA. (TAC ¶ 18.)

At some unspecified date, but before the December 15 events described in ¶ 18, 3DFX and NVIDIA entered into a "secret agreement," to the effect that NVIDIA directed 3DFX "to continue making lease payments as if it, and not NVIDIA were occupying the premises and that NVIDIA would reimburse 3DFX for these payments at a future date. (TAC ¶ 21.)

> The payments made pursuant to the "secret agreement" created the false impression that 3DFX remained a viable tenant. If CARR had known the "true state of affairs," it would have insisted that either NVIDIA assume the lease or that 3DFX vacate so that CARR could lease the premises to a new tenant. (TAC ¶ 21.)
>
> Eventually, 3DFX stopped paying rent allegedly pursuant to the "secret agreement." (TAC ¶ 23)

On the basis of these allegations, CARR asserts claims for: 1) interference with contractual relations against the NVIDIA Defendants; 2) intentional interference with prospective economic advantage against the NVIDIA Defendants; 3) negligent interference with prospective economic advantage against the NVIDIA Defendants; 4) successor liability against NVIDIA; 5) fraudulent transfer against all Defendants under Civil Sections 3439.04(a); 6) 3439.04(b)(1); 7) and 3439.04(b)(2); 8) declaratory relief against all Defendants; 9) breach of fiduciary duty against the 3DFX Defendants; 10) fraud against all Defendants; 11) conspiracy against all Defendants; and 12) tort of another against all Defendants.

Defendants move to dismiss the Third Amended Complaint on the ground that it fails to allege facts which would entitle CARR to relief.

III. STANDARDS

A motion to dismiss under Federal Rule of Civil Procedure 1 2(b)(6) tests the legal sufficiency of a claim.

Navarrov. Block, 250 F.3d 729, 732 (9th Cir. 2001). A complaint may be dismissed as a matter of law for one of two reasons: "(1) lack of a cognizable legal theory or (2) insufficient facts stated under a cognizable theory." Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984). "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The court "must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the non-moving party." Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987) (citing Western Reserve Oil & Gas Co. v. New, 765 F.2d 1428, 1430 (9th Cir. 1985) cert. denied, 474 U.S. 1056 (1986)). However, the court "need not assume the truth of legal conclusions cast in the form of factual allegations." United States ex rel. Chunie v. Ringrose, 788 F.2d 638, 643 n.2 (9th Cir. 1986) (citing Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981), cert. denied, 454 U.S. 1031 (1981)).

A motion to dismiss on the ground that the plaintiff lacks standing to pursue the claim is properly made pursuant to Federal Rule of Civil Procedure 12(b)(6). Michael Schmier v. United States Court of Appeals for the Ninth Circuit, et al., 279 F.3d 817 (9th Cir. 2002).

IV. DISCUSSION

A. A creditor lacks standing to pursue a claim against a defendant for injury inflicted upon a bankrupt company because the right to pursue the claim vests in the Trustee, unless the creditor is alleging an injury particularized to that creditor only.

As explained in the November 10, 2005 Order, and despite CARR's insistence to the contrary, under California law as interpreted by the Ninth Circuit, standing to pursue a general creditor's cause of action is delegated exclusively to the bankruptcy trustee, unless a creditor can show particularized injury. In re Folks, 211 B.R. 378 (9th Cir. BAP 1997); (November 10, 2005 Order at 3.)

"If a claim is a general one, with no particularized injury arising from it, and if that claim could be brought by any creditor of the debtor, the trustee is the proper person to assert the claim, and the creditors are bound by the outcome of the trustee's actions." Id. (quoting Kalb, Voohis Co v. American Fin. Corp., 8 F.3d 130 (2d Cir. 1993) (citations omitted.). A cause of action is general "if the liability is to all creditors of the corporation without regard to the personal dealings between [the corporation's] officers and such creditors." Id. (quoting Koch Refining v. Farmers Union Cent. Exchange, Inc., 831 F.2d 1339, 1349 (7th Cir. 1987). If, on the other hand, "the claimant himself is harmed and no other claimant or creditor has an interest in the cause," the cause of action is personal to the creditor. Id. (quoting Koch

Refining, 831 F.2d at 1348-49.) Injury to the creditor is thus a determining factor. "To determine whether an action accrues individually to a claimant or generally to the corporation, a court must look to the injury for which relief is sought and consider whether it is peculiar and personal to the claimant or general and common to the corporation and creditors." Koch, 831 F.2d at 1348-9.

Furthermore, the Ninth Circuit has expanded the holding of In re Folks to grant standing to a trustee of a bankrupt firm where the trustee alleges that a defendant's dissipation of corporate assets limited the firm's ability to pay its creditors. In re Smith, 421 F.3d 989, 1004 (9th Cir. 2005). Despite "the economic reality that any injury to an insolvent firm is necessarily felt by its creditors," the Defendants' acts in dissipating corporate assets via the Agreement gives rise to only a general claim for which the bankruptcy trustee has exclusive standing to pursue. Id.

B. CARR's First Claim for Intentional Interference with Contractual Relations does not allege a claim for particularized injury.

CARR alleges that the NVIDIA Defendants intentionally interfered with the contractual relationship between CARR and 3DFX by entering into the Agreement and by entering into the "secret agreement." This claim is essentially the same claim that was asserted in the Second Amended Complaint except for the alleged "secret agreement." The Court has previously determined that CARR lacks standing to pursue claims resulting from the Agreement.

Therefore, the issue becomes whether, if CARR alleges breach of the lease and related claims pursuant to both the Agreement and the alleged "secret agreement," it states a claim for a particularized injury.

CARR contends that its Third Amended Complaint alleges a particularized injury because the alleged "secret agreement" only affected 3DFX's rental obligation to CARR. CARR contends that if, as it alleges, 3DFX ceased making rent payments and abandoned the premises "pursuant to" the alleged "secret agreement", this transforms its claim to one for a particularized injury.

Even accepting as true the allegation that 3DFX sold its assets and shut down its operations under both the Asset Purchase Agreement and this newly alleged separate "secret agreement," the cause of any harm suffered by CARR remains the transfer of assets and cessation of operations under the Agreement. Allegations that the harm suffered was caused by the alleged "secret agreement" to have 3DFX continue to pay rent is no more than artful pleading to avoid the overriding effect of the Agreement. If there was any interference with contractual obligations of 3DFX due to lack of notice of its impending demise, that interference came from lack of notice of the Agreement itself, which affected all creditors.

The Court is not called upon to comment whether the bankruptcy trustee has a claim against NVIDIA for contractual interference resulting from the alleged "secret agreement".

The Court DISMISSES CARR's First Claim for Intentional Interference with Contractual Relations without leave to amend on the ground that the alleged facts state a claim of harm to the corporation which affected all creditors.

C. CARR's Second and Third Claims for Intentional and Negligent Interference with Prospective Economic Advantage Claims have been withdrawn.

Given CARR's stated intention to withdraw the Second and Third Causes of Action in its submitted opposition papers, the Court DISMISSES CARR's Second and Third claims. (CARR's Memorandum of Points and Authorities in Opposition to the NVIDIA Defendants' Motion to Dismiss Third Amended Complaint, at 5, Docket No. 112.)

The dismissal is without prejudice; however, there is no reason to believe that the Court would not apply the same legal analysis to these claims as all other claims against NVIDIA.

D. CARR's Fourth Claim for Successor Liability is derived from its infirm First Claim and is thereby, dismissed.

CARR relies word-for-word on the allegations in its Second Amended Complaint to support its successor liability claim in its Third Amended Complaint. (Compare SAC ¶ ¶ 40-45 with TAC ¶¶ 39-44.) While CARR's allegations of a "secret agreement" between NVIDIA and 3DFX, described supra, are incorporated by reference into this claim, CARR has made no

attempt to draw a causal connection between the alleged "secret agreement" and its successor liability claim. Since the Court has previously determined that this claim as alleged in the Second Amended Complaint is a general claim for which CARR lacks standing to pursue, and CARR has not remedied its lack of standing, the Court DISMISSES CARR's Fourth Claim for Successor Liability without leave to amend.

E. CARR's Fifth, Sixth and Seventh Claims for Fraudulent Transfer are general claims and are thereby, dismissed.

CARR's allegations in support of its fraudulent transfer claims are substantially the same as those in its Second Amended Complaint. (Compare SAC ¶ ¶ 50-75 with TAC ¶ ¶ 45-73.) By way of explanation, CARR states that its prosecution of the claims were ordered stayed pending resolution of the underlying proceeding pending in the U.S. Bankruptcy Court for the Northern District of California, and that to the extent the stay is still binding, it will defer prosecution of the claims pending resolution of the adversary proceeding. (TAC ¶ ¶ 57, 65, 73.) However, the Court has previously determined CARR's fraudulent transfer claims to be general claims (see November 10, 2005 Order at 4), and CARR's statements concerning deferment of prosecution does not remedy its lack of standing.

The Court DISMISSES CARR's Fifth, Sixth and Seventh Claims for Fraudulent Transfer without leave to amend.

F. CARR's Eighth Claim for Declaratory Relief is derivative of infirm claims and is thereby, dismissed.

CARR has asked the Court to issue a "judicial determination of the rights and duties of CARR and [D]efendants" with respect to NVIDIA's alleged successor liability and obligations under the Lease. (See TAC ¶ ¶ 75-77.) "'[A] request for declaratory relief will not create a cause of action that otherwise does not exist.' Rather, 'an actual present controversy must be pleaded specifically' and 'the facts of the respective claims concerning the [underlying] subject must be given.'" City of Cotati v. Cashman, 29 Cal. 4th 69, 80 (2002) (citations omitted). Accordingly, CARR's claim for declaratory relief is wholly derivative of its foregoing claims.

The Court DISMISSES CARR's Eighth Claim for Declaratory Relief without leave to amend.

G. CARR's Ninth Claim for Breach of Fiduciary Duty fails to state a claim.

CARR alleges that the 3DFX Defendants breached their fiduciary duties owed to CARR as a creditor by entering into the "secret agreement" with NVIDIA which concealed the fact that 3DFX would be going out of business and would eventually breach the Lease. (TAC ¶ ¶ 79-81.)

A corporation's directors and officers owe no fiduciary duty to creditors under California law until the corporation becomes insolvent. In re Jacks, 243 B.R. 385, 390 (Bankr. Ct. C.D. Cal. 1999), aff'd in part,

rev'd in part, 266 B.R. 728 (9th Cir. B.A.P. 2001).[4] "Because a director's fiduciary duties to creditors do not arise until the corporation is insolvent, the timing of the insolvency is critical." In re Jacks, 266 B.R. at 738. The time of insolvency as determined under California law is the point at which the corporation is unlikely to be able "to meet its liabilities . . . as they mature." Id. (quoting Cal. Corp. Code § 501).

Once a corporation becomes insolvent, the scope of a director's or officer's fiduciary duty to creditors is to

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[4] As the In re Jacks Bankruptcy Court noted: "[t]o a substantial extent, the right to recover from directors or officers of California corporations for the violation of their fiduciary duties has been codified in California statute." In re Jacks, 266 B.R. at 391. On appeal, the In re Jacks Bankruptcy Appellate Panel commented that although "California's Corporation Code provides a remedy for an insolvent corporation's director's violations of fiduciary duties to creditors . . . 'the common law is not repealed by implication or otherwise, if there is no repugnancy between it and the statute, and it does not appear that the legislature intended to cover the whole subject.' California's corporate statutes, while modifying remedies, do not eliminate the trust comprised of corporate assets that arises upon a corporation's insolvency." In re Jacks, 266 B.R. at 737 (internal citation omitted). Since CARR does not raise this claim in a statutory context, the Court does not consider its application, but rather, considers the common law application of CARR's claim to determine if there was a breach of a fiduciary duty for the purposes of this Order.

not "divert, dissipate or unduly risk assets necessary to satisfy their claims." In re Ben Franklin Retail Stores, Inc., 225 B.R. 646, 655 (Bankr. Ct. N.D. Ill.1998), amended and superseded by, 2000 WL 28266 (N.D. Ill. Jan. 12, 2000). California courts have applied the "trust fund doctrine" where "all of the assets of a corporation, immediately on its becoming insolvent, become a trust fund for the benefit of all of its creditors." In re Jacks, 266 B.R. at 736 (quoting Saracco Tank & Welding Co., Ltd. v. Platz, 65 Cal. App. 2d 306, 315 (1944) (internal citation omitted)). Under the trust fund doctrine, the directors and officers of the insolvent corporation become fiduciaries whose obligations to the creditors is to protect the assets of the insolvent corporation to satisfy their claims. See, e.g. Saracco, 65 Cal. App. 2d at 315.

Recovery for breaching this fiduciary duty generally pertains to cases where the directors or officers of an insolvent corporation have diverted assets of the corporation "for the benefit of insiders or preferred creditors." In re Ben Franklin, 225 B.R. at 655 (quoting from Laura Lin, Shift of Fiduciary Duty Upon Corporate Insolvency: Proper Scope of Directors' Duty of Creditors, 46 Vand. L. Rev. 1485, 1512 (1993)); see also Bank of America v. Musselman, 222 F. Supp. 2d 792 (E.D. Va. 2002); see also Helm Financial Corp. v. MNVA R.R., 212 F.3d 1076, 1081 (8th Cir. 2000).

Although the Court is unaware of any California cases that expressly limit the fiduciary duty under the trust fund doctrine to the prohibition of self-dealing or the preferential treatment of creditors, the scope of the trust fund doctrine in California is reasonably limited to cases where directors or officers have diverted,

dissipated, or unduly risked the insolvent corporation's assets. See In re Jacks, 266 B.R. at 736 (trust fund doctrine applied to a director's use of an insolvent corporation's assets to guarantee a personal debt); c.f. Commons v. Schine, 35 Cal. App. 3d 141, 145 (1973) (trust fund doctrine applied to a controlling partner's preference in paying insolvent partnership's debt to his own creditor corporation); see also Saracco, 65 Cal. App. 2d 306 (1944) (trust fund doctrine applied to a director's preferential distribution of assets); see also Wright Motor, 299 F. 106 (1924) (trust fund doctrine applied to a director's fraudulent transfer of corporate assets to himself); c.f. Title Ins. etc. Co. v. California Dev. Corp., 171 Cal. 173 (1915) (trust fund doctrine applied to a company controlling an insolvent development corporation's preferential payment of the insolvent development corporation's debts); see also Bonney v. Tilley, 109 Cal. 346 (1895) (trust fund doctrine applied to directors of an insolvent corporation, who were also creditors of the corporation, secured a preference to their claims over other creditors' claims). Given the application of the trust fund doctrine in California, the scope of the fiduciary duty to creditors can be broadly defined as not diverting, dissipating or unduly risking the corporate assets needed to satisfy creditors' claims.

As the court observed in In re Ben Franklin in defining the scope of a director's fiduciary duty to creditors under Delaware law, "the 'insolvency exception' to the general rule that directors owe no duty to creditors is, after all, an exception. Its scope should be no greater than the problem it was intended to solve." In re Ben Franklin, 225 B.R. at 655-56. A similar approach is taken by the Court in determining

whether the 3DFX Defendants could have breached a fiduciary duty owed to CARR as a creditor by entering into the "secret agreement".

The Third Amended Complaint alleges that a fiduciary relationship existed between CARR and the 3dfx Defendants because "when the [Agreement] was being negotiated and then executed, 3DFX was insolvent and/or in the zone of insolvency and the officers and directors thereby owed a fiduciary duty to CARR." (TAC ¶ 79.) CARR contends given that the Third Amended Complaint alleges that the "secret agreement" was created during the same month as the Agreement, which caused 3DFX's insolvency, a reasonable inference for the purposes of these motions can be made that the "secret agreement" occurred when 3DFX was insolvent and the 3DFX Defendants had a fiduciary duty to CARR.

Given that the 3DFX Defendants owed a fiduciary duty to CARR to protect the assets of 3DFX, the Third Amended Complaint must show that this duty was breached. The Third Amended Complaint alleges that this fiduciary duty was breached when the 3DFX Defendants entered into the "secret agreement" to hide the fact "that 3DFX would cease doing business on or about December 15, 2000, and would thereafter be in breach of the CARR Lease." (TAC ¶ 81.) However, this alleged breach of fiduciary duty is not related to protecting the assets of 3DFX in order to satisfy creditors' claims. Rather, the "secret agreement" is alleged to have breached a duty to disclose the source of 3DFX's rent payments and the fact that 3DFX was insolvent. Since the Third Amended Complaint does not allege that the "secret agreement" diverted,

dissipated or unduly risked the assets necessary to satisfy creditors' claims for which the 3DFX Defendants owed a fiduciary duty toprotect, the Third Amended Complaint has not alleged that the 3DFX Defendants breached their fiduciary duty.

Furthermore, the nature of the "secret agreement" as alleged in the Third Amended Complaint reasonably suggests that the "secret agreement" may have actually helped protect the assets of 3DFX. The "secret agreement" is alleged to have provided a means by which 3DFX could continue paying its rent obligations to CARR at a time when 3DFX was allegedly unable to meet its liabilities as they became due. (TAC ¶ 81.) Even though the "secret agreement" is alleged to have also included the cessation of rent payments, the execution of the "secret agreement" as alleged in the Third Amended Complaint does not suggest that the rent payments that would otherwise go to CARR were diverted to a preferred creditor or used by the 3DFX Defendants in promoting their own self-interest.

The Court DISMISSES CARR's Ninth Claim for Breach of Fiduciary Duty with leave to amend.

H. CARR's Tenth Claim for Fraud is indistinguishable from the First Claim and is thereby dismissed on the same ground.

CARR's Tenth Claim for Fraud is a new claim asserted in the Third Amended Complaint. The fraud claim is primarily based upon a failure to disclose the "secret agreement." As discussed above, the injury from

the alleged "secret agreement" is indistinguishable from those allegedly inflicted upon the corporation through the implementation of the Asset Purchase Agreement and are consequently unparticularized as the CARR.

Without reaching the merits of the claim, the Court DISMISSES CARR's Tenth Claim for Fraud for lack of standing; the dismissal is with prejudice.

I. CARR's Eleventh Claim for Conspiracy is dismissed for lack of standing.

CARR alleges in its Third Amended Complaint that the Defendants conspired in creating the Agreement and the "secret agreement." (TAC ¶ 95.)

Under California law, "[n]o cause of action exists for conspiracy itself; the pleaded facts must show something which, without the conspiracy, would give rise to a cause of action." Zumbrun v. Univ. of Southern California, 25 Cal. App. 3d 1, 12 (1972). "Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration." Applied Equip. v. Litton Saudi Arabia Ltd., 7 Cal. 4th 503, 510-11 (1994) (citing Wyatt v. Union Mortgage Co., 24 Cal.3d 773, 784 (1979)). Given that CARR has no standing to pursue the contractual interference claim against the NVIDIA Defendants, it has no standing to pursue the conspiracy claim.

The Court DISMISSES CARR's Eleventh Claim for Conspiracy without leave to amend.

J. CARR's Twelfth Claim for relief under a "Tort of Another" theory is dismissed.

Under the American rule, each party must generally pay his or her own attorney fees. Gray v. Don Miller & Associates, Inc., 35 Cal. 3d 498, 504 (1984). This rule is subject to several exceptions, one of which is the "tort of another," or "third party tort" exception, which allows recovery of attorney fees where the plaintiff is required to employ counsel to prosecute or defend an action against a third party because of the tort of the defendant. Id. at 505. CARR's alleged entitlement to recoupment of any attorney fees as damages arising from NVIDIA's allegedly tortious behavior toward 3DFX derives from its having standing to sue NVIDIA for the alleged tort. Lacking standing, CARR may not maintain this claim.

The Court DISMISSES CARR's Twelfth Claim for relief under a "Tort of Another" theory without leave to amend.

V. CONCLUSION

The Court GRANTS Defendants' Motions to Dismiss CARR's Third Amended Complaint.

With respect to the NVIDIA Defendants, the Court finds that there are no circumstances which would entitle CARR to proceed against NVIDIA for the alleged harm it inflicted on 3DFX and derivatively upon CARR. Therefore, the First, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, Eleventh, and Twelfth claims against NVIDIA are dismissed with prejudice.

With respect to the 3DFX Defendants, all claims are dismissed with prejudice except the Ninth Claim for Breach of Fiduciary Duty. Should CARR wish to file an amended complaint, it shall file within 30 days from the date of this Order.

Dated: September 29, 2006

JAMES WARE
United States
District Judge

THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:

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Dated: September 29, 2006 **Richard W. Wieking, Clerk**

By: /s/ JW Chambers
Elizabeth Garcia
Courtroom Deputy

11 U.S.C. § 541. Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is--

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the

petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date--

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

* * *

11 U.S.C. § 704. Duties of trustee

(a) The trustee shall--

(1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest;

(2) be accountable for all property received;

(3) ensure that the debtor shall perform his intention as specified in section 521(2)(B) of this title;

(4) investigate the financial affairs of the debtor;

(5) if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper;

(6) if advisable, oppose the discharge of the debtor;

(7) unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest;

(8) if the business of the debtor is authorized to be operated, file with the court, with the United States trustee, and with any governmental unit charged with responsibility for collection or determination of any tax arising out of such operation, periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information as the United States trustee or the court requires;

(9) make a final report and file a final account of the administration of the estate with the court and with the United States trustee;

(10) if with respect to the debtor there is a claim for a domestic support obligation, provide the applicable notice specified in subsection (c);

(11) if, at the time of the commencement of the case, the debtor (or any entity designated by the debtor) served as the administrator (as defined in section 3 of the Employee Retirement Income Security Act of 1974) of an employee benefit plan, continue to perform the obligations required of the administrator; and

(12) use all reasonable and best efforts to transfer patients from a health care business that is in the process of being closed to an appropriate health care business that--

(A) is in the vicinity of the health care business that is closing;

(B) provides the patient with services that are substantially similar to those provided by the health care business that is in the process of being closed; and

(C) maintains a reasonable quality of care.

* * *